IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 1, 2009 Session

STATE OF TENNESSEE EX REL. COMMISSIONER OF THE TENNESSEE DEPARTMENT OF TRANSPORTATION
v.
WEST COAST, LLC

An Appeal from the Circuit Court for Bedford County
No. 10579 Franklin L. Russell, Judge

No. M2009-00140-COA-R3-CV - Filed December 14, 2009

This is a condemnation case. The state filed a petition to condemn real property owned by the defendant, and the parties disputed the value of the property. The parties later agreed to a settlement. In accordance with the settlement agreement, the state drafted a proposed consent order and placed $400,000 into escrow for the defendant. The defendant then informed the state that the property was encumbered by a previously undisclosed mortgage, which interrupted resolution of the condemnation case. Meanwhile, the trial judge was also presiding over a separate case. The trial judge attached the $400,000 escrowed in the instant condemnation case upon the request of a party in the separate case. Shortly thereafter, the trial court disbursed $367,000 of the escrow monies to the party in the separate case. The attorney for the defendant in the instant case then filed a motion to enforce her attorney's lien over the remaining funds held in escrow. The trial court entered an order resolving the condemnation of the property, but stating that the issue of the attorney's lien would be decided in the context of the resolution of the separate case. The defendant now appeals. Because the trial court did not enter a final order in the instant case, we must dismiss the appeal for lack of subject matter jurisdiction.

Tenn. R. App. P. 3 Appeal as of Right; Appeal is Dismissed for Lack of Jurisdiction

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Suzette Peyton, Nashville, Tennessee, for the appellant, West Coast, LLC.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Larry M. Teague for the appellee, State of Tennessee *ex rel*. The Commissioner of the Tennessee Department of Transportation.

OPINION

On October 13, 2005, the Plaintiff/Appellee Tennessee Department of Transportation ("TDOT") filed this petition for condemnation to acquire a 3.27-acre tract of land owned by Defendant/Appellant West Coast, LLC ("West Coast"). Along with the petition, the State of Tennessee, on behalf of TDOT, tendered $188,000 as just compensation for this acquisition. The funds were placed in escrow in the clerk's office of the Bedford County Circuit Court. Two weeks later, by consent order, the $188,000 in escrow monies was disbursed to West Coast. ***See*** Tenn. Code Ann. § 29-17-906. After appraisals of the property were completed, the State tendered an additional $212,000 in escrow to the clerk's office, for a total payment of $400,000. Those funds were later paid to West Coast by consent of the parties.

On May 4, 2007, West Coast filed an answer to TDOT's petition for condemnation, asserting that the amounts paid by the State were still insufficient compensation for the condemned property. West Coast requested a jury trial on the valuation of the property.[1] The case was scheduled for trial on October 29, 2009.

Prior to trial, the parties successfully mediated the case. They entered into a settlement agreement whereby the State agreed to pay West Coast an additional $400,000 for the property. Pursuant to the settlement agreement, on August 22, 2007, the State submitted a proposed consent order to West Coast and tendered $400,000 in escrow to the trial court clerk's office "for any and all property rights condemned by the State of Tennessee . . . ."

At that point, West Coast informed the State that it could not sign the proposed order because the property at issue was encumbered by a lien. The heretofore undisclosed lien was held by Pinnacle Bank ("Pinnacle") and secured by a deed of trust signed by the previous owner of the property, Paul Caruana ("Caruana"), the manager and sole shareholder of West Coast. The reason that the lien was neither disclosed nor discovered earlier by the State is unclear in the record.[2] In any event, this disclosure interrupted the resolution of the condemnation matter.

Meanwhile, the same trial judge was presiding over a separate case, *Dan J. Marcum v. Paul F. Caruana and Tennessee Motors, Inc.*, docket number 8911 ("the *Marcum* case" or "case no. 8911"). This action was filed by Marcum against Caruana, who is, as noted above, the manager and sole shareholder of West Coast. However, West Coast was not a party to this separate litigation. Neither Marcum nor Caruana is or has ever been a party or intervenor in the instant case. At no time were the two cases consolidated for any purpose.

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[1] On May 4, 2007, Suzette Peyton entered a notice of appearance as counsel for West Coast.

[2] According to West Coast, "[t]he lien to Pinnacle [Bank] is in the chain of title and was not picked up by the person in the State's office who did the title search." The reason the lien was not discovered, however, is not relevant for purposes of our analysis.

On August 31, 2007, in the separate *Marcum* case, Marcum filed a motion for a writ of attachment, asking the trial court to attach the $400,000 in escrow in the instant case. Apparently, in the context of the *Marcum* case, Marcum asserted that the monies held by the court clerk for West Coast in the instant case actually belonged to Caruana individually, under a "piercing of the corporate veil" theory. No pleadings were filed in the case at bar regarding Marcum's request for attachment, and there is no indication in the record that either TDOT or West Coast were notified or heard on Marcum's request.

On the same day that Marcum filed his attachment request in the *Marcum* case, the trial judge granted the writ as requested and entered an order in the instant case attaching the $400,000 on deposit with the trial court clerk. Less than two weeks later, with no intervening proceedings in the case at bar, the trial court entered an order in the instant case releasing $367,556 of the attached funds payable to Pinnacle Financial Partners ("Pinnacle"). From the appellate record in this case, it appears that Pinnacle was not a party in the *Marcum* case but was purportedly a creditor of Caruana.[3] Again, there is no indication in the record that either TDOT or West Coast were notified or heard before the monies escrowed in the case at bar were released to Pinnacle, a stranger to this condemnation case.

On October 25, 2007, Suzette Peyton ("Peyton"), the attorney for West Coast in this case and for Caruana in the *Marcum* case, filed a notice of attorney's lien on the remaining funds held in escrow in the instant case, about $32,443. Several months later, on August 8, 2008, Peyton filed a motion in the instant case for enforcement of her attorney's lien, which by then amounted to $44,567.99, more than the amount of funds remaining in escrow. The State did not oppose this motion. The State prepared a consent order providing for the transfer of ownership of the subject property to the State, and providing for disbursement of the remaining funds in escrow to Peyton pursuant to her attorney's lien. The parties approved this order and submitted it to the trial court.

The trial court declined to approve the parties' proposed consent order as written. On August 14, 2008, the trial court wrote a letter to the parties instructing them to amend the proposed order to include a provision instructing the clerk's office to retain the balance of the escrow funds in the instant case pending resolution of the *Marcum* case. West Coast refused to consent to an order containing this provision. The trial court then scheduled a hearing on the matter.

The trial court held this hearing on September 11, 2008. On September 15, 2008, the State filed a "Notice of Filing a Settlement Agreement," which incorporated the details of the parties' previous settlement arrangement and vested title of the property in the State. On September 23, 2008, in the instant case, the trial court entered an "Order Memorializing Mediation Agreement an Transferring Title to Land." The order reiterated most of the terms of the parties' earlier settlement

[3] In May 2008, Peyton filed an interlocutory appeal in the *Marcum* case pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, seeking a review of the trial court's actions in issuing the facially invalid writ of attachment, disbursing the funds of this case to a non-party in the *Marcum* case, and in "refusing to hold a hearing for in excess of eight months up to and including the present." This motion was denied.

agreement, but further provided that "[t]he Clerk of this Court is hereby directed to retain the remaining sum of [$32,443.33] until resolution of the dispute that has arisen in [the *Marcum* case]."

On October 22, 2008, West Coast filed a motion to alter or amend the September 23, 2008 order, claiming that (1) both of the parties repudiated their former agreement by virtue of the entry of the *Marcum* attachment order; (2) the earlier agreement does not address the priority of Peyton's attorney's lien; and (3) the order directs the clerk of the court to "retain the remaining sum" in escrow until resolution of the *Marcum* case. On December 11, 2008, the trial court held a hearing on West Coast's motion to alter or amend. On January 14, 2009, the trial court entered an order denying West Coast's motion to alter or amend. The trial court stated that it considered the order to be a final order, but specified that the attorney's lien issue would be resolved at a later date in the context of the *Marcum* litigation:

> The Court considers the [order] to be a final order concluding all issues presented in this cause, but the Court states for the record of this cause that the Court has not adjudicated the issue of the respective priority of (1) the attorney's lien asserted herein by Suzette Peyton and (2) the attachment of the remaining [$32,443.33] that the Clerk of this Court retains in this cause, which attachment was issued by the Court in *Dan J. Marcum v. Paul F. Caruana*, . . . which issue shall be resolved in the context of the *Marcum* litigation.

From this order, West Coast now appeals.

On appeal, West Coast argues that the trial court erred in enforcing the terms of the parties' former settlement agreement when its terms had effectively been rescinded, and that the trial court erred in refusing to enforce Peyton's attorney's lien. At oral argument, West Coast clarified that it primarily seeks enforcement of the attorney's lien.

As a threshold issue, we must determine whether this Court has subject matter jurisdiction to hear this appeal. Even if the parties do not raise the issue, the Court has a duty to make certain that it has subject matter jurisdiction. ***See Carson v. Daimlerchrysler Corp.***, No. W2001-03088-COA-R3-CV, 2003 WL 1618076, at *2 n.1 (Tenn. Ct. App. Mar. 19, 2003); ***Seeber v. Seeber***, No. 03A01-9508-CV-00290, 1996 WL 165092, at *4 (Tenn. Ct. App. Apr. 10, 1996); Tenn. R. App. P. 13(b).

Rule 3 of the Tennessee Rules of Appellate Procedure provides that if multiple parties or multiple claims are present in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not final or appealable. Except where otherwise provided, this Court only has subject matter jurisdiction over final orders. **S*ee Bayberry Assocs. v. Jones***, 783 S.W.2d 553, 559 (Tenn. 1990).

In this case, the trial court's order states expressly that it has not adjudicated all of the rights and liabilities of the parties, in that it stated "for the record" that it intended to rule on the issue of

Peyton's attorney's lien "in the context of the *Marcum* litigation." Thus, because all the claims before the trial court were not adjudicated, this Court could only have jurisdiction to hear this matter if permission to appeal has been granted or if the order appealed has been made final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure. Permission to file an interlocutory appeal was not granted, and although the trial court declared its intent to make the order final, the order was not made final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.[4] Therefore, we must conclude that a final, appealable order has not been entered in this case, and we do not have jurisdiction to hear this appeal. ***See*** Tenn. R. App. P. 3(a).

The appeal is dismissed. Costs on appeal are to be taxed to Appellant West Coast, LLC, and its surety, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE

[4] The order did not include the "magic language" of Rule 54.02, which requires "that there be an express determination that there is no just reason for delay and that there be an express direction for entry of a final judgment." ***See Tennessee Farmers Mut. Ins. Co. v. Bradford***, No. 02A01-9711-CV-00284, 1999 WL 528835, at *3 (Tenn. Ct. App. July 23, 1999); Tenn. R. Civ. P. 54.02. Of course, in this case, Rule 54.02 language would have been of little use to West Coast, since the issue of the attorney's lien would not have been part of the ruling that was "made final" and thus brought up on appeal.